

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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Federal Communications Commission
Washington, D.C. 20554

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In the Matter of)

Implementation of the)
Telecommunications Act of 1996)

Telecommunications Carriers' Use)
of Customer Proprietary Network)
Information and Other Customer)
Information)

CC Docket No. 96-115

COMMENTS OF AT&T CORP.

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SUMMARY

The Commission's Notice seeks comments on the interplay between section 222, which imposes certain obligations concerning privacy of customer information on all carriers, and sections 272 and 274, which impose safeguards on the Bell Operating Companies' provision, respectively, of in-region interLATA telecommunications and information services and electronic publishing services.

AT&T showed in its June 11, 1996 comments that the Commission can best balance consumer privacy and competitive concerns if it construes section 222(c)(1) to allow carriers to use customer proprietary network information ("CPNI") for the provision of all of a carrier's basic telecommunications service (local, long distance, wireless) without prior customer authorization, and to require that, before using CPNI for the marketing of non-telecommunications services, a carrier provide a one-time notification to customers that would give each customer an opportunity to withdraw consent for the use of CPNI for any purpose other than the provision of basic service. This approach is consistent with the Act's definition of "telecommunications service" and allows consumers to benefit from competition through increased choice, and the convenience of "one-stop shopping," without compromising their privacy interests.

Although, with limited exceptions, section 222 does not apply differing requirements on various categories of carriers, sections 272 and 274 impose explicit additional

nondiscrimination obligations on the BOCs. As shown in Part I, in the Non-Accounting Safeguards Order (¶ 202, 222) the Commission expressly determined that the nondiscrimination requirements of that section extend to CPNI. The Commission also held that section 272(c)(1) imposes an unqualified nondiscrimination obligation more stringent than the "unjust and unreasonable" discrimination prohibition of section 202(a), with the result that the "BOCs must treat all other entities in the same manner in which they treat their section 272 affiliates." *Id.* at ¶ 16, 197. Indeed, the Commission has already concluded that under section 272(c)(1) a BOC must provide to unaffiliated entities the same goods, services, and information that it provides to its section 272 affiliate at the same rates, terms and conditions. *Id.* at ¶ 202. The joint marketing provisions of section 272 do not alter these obligations because access to BOC CPNI is not a component of marketing or sales activity.

Taking sections 222 and 272 together, a BOC cannot use, disclose or permit access to CPNI of its customers, directly or indirectly, for the benefit of its section 272 affiliate, unless the CPNI is made available to all competing entities on nondiscriminatory terms. Thus, if a BOC were to use CPNI without customer consent (or any form of consent other than affirmative written consent) it must disclose the CPNI to all other entities desiring access to it on the same terms and conditions. If the section 272

affiliate obtains express written consent (in the same manner any other unaffiliated third party could), then the BOC may disclose CPNI to its 272 affiliate without disclosing it to unaffiliated entities. This latter approach protects customer privacy and puts the section 272 affiliate in the same position as an unaffiliated third party, thereby ensuring compliance with section 272(c)(1)'s nondiscrimination obligation. As shown in Part II, a similar analysis pertains under Section 274 to the use, disclosure and access to BOC CPNI in connection with electronic publishing provided through a separated affiliate, electronic publishing joint venture, affiliate, teaming or business arrangement.

If a BOC solicits customer approval to use CPNI on behalf of, or to disclose CPNI to, its section 272 affiliate (or the various electronic publishing relationships that it is permitted to enter into under section 274), it must offer an "approval solicitation service" to unaffiliated entities, otherwise it would be engaging in preferential conduct towards its affiliate. For such an approval solicitation service to be nondiscriminatory, a BOC would have to obtain approval for disclosure of the CPNI to all competing entities; the solicitation for approval for the affiliated and competing entities must be made at the same time; and the CPNI must be made available to any unaffiliated entity desiring to receive it under the same terms and conditions, and at the same time, as to the BOC-affiliated entity. To

prevent the BOC-affiliated entity from gaining earlier access to the CPNI than competing entities, a BOC may not use, disclose or access the CPNI for the benefit of its affiliated entity until it has posted the transaction in the manner specified in the Accounting Safeguards Order (§ 122) and until a reasonable waiting period (for example, 10 days) has elapsed.

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COMMENTS OF AT&T CORP.

Pursuant to the Commission's Public Notice, DA 97-385, released on February 20, 1997 ("Notice"), and Section 1.415 of the Commission's Rules, 47 C.F.R. § 1.415, AT&T Corp. ("AT&T") submits these further comments on the implementation of section 702 of the Telecommunications Act of 1996¹ (which adds a new section 222 to the Communications Act of 1934) regarding the use and protection of customer proprietary network information ("CPNI").² In the Notice, the

¹ Pub. L. No. 104-104, 110 Stat. 56 (1996), codified at 47 U.S.C. § 151, et seq. ("1996 Act").

² AT&T had filed both Comments (June 11, 1996) and Reply Comments (June 26, 1996) in response to the Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, CC Docket No. 96-115, Notice of Proposed Rulemaking, 11 FCC Rcd. 12513 (1996) ("CPNI NPRM").

Commission asks questions concerning the interplay between section 222 (*Privacy of Customer Information*) and sections 272 (*Separate Affiliate; Safeguards*) and 274 (*Electronic Publishing by Bell Operating Companies*) of the 1996 Act. Although the Commission has not yet construed section 222, it has already addressed sections 272 and 274 in separate orders.³ As the Notice (at 1-2) makes clear, however, the Commission's section 272 and 274 orders deferred certain issues relating to CPNI for resolution to the instant section 222 proceeding.⁴

Before addressing each of the questions posed in the Notice, AT&T urges the Commission to adhere to its stated intent, in implementing the CPNI provisions of the Act, to adopt a "regulatory regime that balances consumer privacy and competitive considerations" CPNI NPRM ¶ 2. As AT&T showed in its initial comments in this proceeding, such a balance would best be struck if the Commission were to construe section 222(c)(1) of the Act to allow carriers generally to use CPNI for the provision of all of the

³ See Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1996, as amended, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, FCC 96-489, released December 24, 1996 ("Non-Accounting Safeguards Order"); Implementation of the Telecommunications Act of 1996: Telemessaging, Electronic Publishing, and Alarm Monitoring Services, CC Docket No. 96-152, First Report and Order and Further Notice of Proposed Rulemaking, FCC 97-35, released February 7, 1997 ("Electronic Publishing Order").

⁴ Non-Accounting Safeguards Order, ¶¶ 222, 300; Electronic Publishing Order, ¶¶ 142, 169.

carrier's basic telecommunications service (local, long distance, wireless) without prior customer authorization, and to require that, before using CPNI for the marketing of non-telecommunications services, carriers provide a one-time notification to customers that would advise each customer of his or her CPNI rights, and give each customer an opportunity to withdraw consent for the use of CPNI for any purpose other than the provision of basic service.⁵

This approach is entirely consistent with the Act's definition of "telecommunications service" and with consumer privacy interests, and would allow consumers to reap the fruits of competition through increased choice, the convenience of "one-stop shopping," innovative new service offerings, and lower prices. Indeed, the Commission has repeatedly and expressly found that broad use of CPNI within a firm does not raise significant privacy concerns,⁶ and that consumers would not object to having their CPNI disclosed within a firm to increase the competitive offerings made to

⁵ AT&T Comments, filed June 11, 1996, at 5-11 and 12-16. AT&T also showed that the Commission should clarify that section 222(c)(2) does not require written customer consent for an incumbent LEC to disclose CPNI to a competitive LEC ("CLEC") who has won that customer, because such information is necessary for the CLEC to "initiate" service, and, as such, disclosure is permitted under section 222(d)(1). *Id.* at 17-19.

⁶ Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards, 6 FCC Rcd. 7571, 7611 n.159 (1991) (emphasis added).

them.⁷ The 1996 Telecommunications Act has not superseded these Commission findings.

When considering the interplay between sections 222, 272 and 274, as addressed in the Notice, two additional critical considerations come into play. First, although, with limited exceptions, the section 222 requirements do not apply differently to different categories of carriers, sections 272 and 274 impose explicit additional nondiscrimination obligations on the Bell Operating Companies ("BOCs") and their affiliates -- obligations that clearly extend to CPNI. Accordingly, for this reason and by operation of these sections, the BOCs have different CPNI duties than other carriers.⁸

Second, the joint marketing provisions of sections 272(g) and 274(c) do not constitute authorizations for the BOCs to use CPNI in permissible joint marketing activities, absent compliance with sections 272's and 274's nondiscrimination requirements and section 222. To the contrary, the joint marketing provisions concern marketing, which even in its broadest construction deals with when, what and how information will be presented to the consumer and do not determine whether CPNI (i.e., information related to a

⁷ Amendment to Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), 3 FCC Rcd. 1150, 1163 (1988) (emphasis added).

⁸ Some, but not all, of the statutory nondiscrimination provisions may sunset at the three- and four-year intervals specified in the Act. See sections 272(f)(1) and (f)(2); section 274(g)(2); but see section 272(e)(2).

customer's use of a BOC's telecommunications service) may be employed for service development, or to target the customer for any marketing or sales efforts.

As detailed in the following responses to the questions posed in the Commission's Notice, under both sections 272 and 274 Congress conditioned a BOC's use or disclosure of CPNI for the benefit of its section 272 affiliate and section 274 separated affiliate, electronic publishing joint venture, or teaming arrangement upon compliance with nondiscrimination and operational independence requirements. Accordingly, with respect to CPNI, section 272's and section 274's nondiscrimination requirements do not permit a BOC to use, disclose or permit access to CPNI of BOC customers for the benefit of its separate affiliate, directly or indirectly, unless the CPNI is made available to all competing entities on the same terms, or unless the BOC affiliate gained access to it in precisely the same manner that an unaffiliated third party could -- namely, by obtaining the customer's affirmative written consent.

I. INTERPLAY BETWEEN SECTION 222 AND SECTION 272

A. USING, DISCLOSING, AND PERMITTING ACCESS TO CPNI

1. Does the requirement in section 272(c)(1) that a BOC may not discriminate between its section 272 "affiliate and any other entity in the provision or procurement of . . . services . . . and information . . ." mean that a BOC may use, disclose, or permit access to CPNI for or on behalf of that affiliate only if the CPNI is made available to all other entities? If not, what obligation does the nondiscrimination requirement of section 272(c)(1) impose on a BOC with respect to the use, disclosure, or permission of access to CPNI?

Pursuant to section 272, a BOC cannot use, disclose or permit access to CPNI for its section 272 affiliate's services in a manner that discriminates against unaffiliated third parties. Non-Accounting Safeguards Order, ¶¶ 222, 202. Thus, if a BOC were to use CPNI without customer consent (or any form of consent other than affirmative written consent obtained by the affiliate) for the benefit of its section 272 affiliate, it must disclose the CPNI to all other entities desiring access to it on the same terms and conditions. If such widespread disclosure of CPNI is prohibited by section 222 -- because it would violate customer privacy expectations -- then the BOC cannot use, disclose or access such information in this way for its affiliate.

The straightforward remedy to the discrimination problem provided by the Act, which appropriately balances customer privacy interests and competitive concerns, conditions a BOC's use or disclosure of CPNI for the benefit of its section 272 affiliate on compliance with the same procedures that a third party would need to employ to gain access to BOC CPNI. If the section 272 affiliate obtains

express written customer consent (in the same manner any other unaffiliated third party could do under section 222(c)(2)), then the BOC may disclose CPNI to its section 272 affiliate without disclosing it to other unaffiliated entities. This approach protects customer privacy and puts the section 272 affiliate in the same position as an unaffiliated third party, thereby ensuring compliance with section 272(c)(1)'s nondiscrimination edict and fair competition.

2. If a telecommunications carrier may disclose a customer's CPNI to a third party only pursuant to the customer's "affirmative written request" under section 222(c)(2), does the nondiscrimination requirement of section 272(c)(1) mandate that a BOC's section 272 affiliate be treated as a third party for which the BOC must have a customer's affirmative written request before disclosing CPNI to that affiliate?

As a threshold matter, the Act does not require "affirmative written" consent for use, disclosure, or access to CPNI. A carrier may use, disclose or access CPNI based on customer "approval" as specified in section 222(c)(1). At the same time, section 222(c)(2)'s requirement of affirmative written consent ensures that a carrier may not deny a competitor access to CPNI if that competitor has a customer's affirmative written consent to obtain such information.

For purposes of section 272, whatever approach a BOC uses in connection with its section 272 affiliate's services, it must use for all third parties. The need to treat the section 272 affiliate as a "third party" stems from section 272(a)(1)(A)'s requirement that the affiliate be "separate from any operating company entity"; section 272(b)(1)'s

prescription that the separate affiliate "operate independently" from the BOC; and sections 272(c)(1)'s and 272(e)'s prohibition on discrimination. It would clearly be discriminatory -- and barred by the Act -- to require affirmative written consent for unaffiliated third parties to access BOC CPNI but to allow a BOC to use or disclose CPNI for the benefit of its section 272 affiliate based on some other form of approval. See also Response to Question 1.

3. If a telecommunications carrier may disclose a customer's CPNI to a third party only pursuant to the customer's "affirmative written request" under section 222(c)(2), must carriers, including interexchange carriers and independent local exchange carriers (LECs), treat their affiliates and other intra-company operating units (such as those that originate interexchange telecommunications services in areas where the carriers provide telephone exchange service and exchange access) as third parties for which customers' affirmative written requests must be secured before CPNI can be disclosed? Must the answer to this question be the same as the answer to question 2?

In those circumstances where customer approval is required,⁹ Section 222(c)(1) allows a carrier to use or disclose CPNI based on "non-affirmative" "non-written" approval. This form of "approval" is different from the affirmative written consent required when a third party seeks to gain access to a carrier's CPNI under section 222(c)(2). Moreover, section 222 does not require carriers to treat their

⁹ As AT&T explained in its June 11, 1996 comments (at 5-11), the term "telecommunications service" as used in section 222(c)(1) includes all of a carrier's basic telecommunications services, and thus section 222(c)(1) does not require a carrier to obtain approval to use CPNI to market those services, namely, local, long distance and wireless.

affiliates and intra-company operating units as third parties. The BOCs and independent ILECs have heightened nondiscrimination obligations under other sections of the 1996 Act which require them to treat their affiliates and intra-company operating units as third parties.¹⁰

The 1996 Act's new nondiscrimination requirements do not apply to carriers such as IXC's, CLEC's and CMRS providers. Accordingly, IXC's and other non-ILECs are not required to treat their affiliates and other intra-company operating units as third parties for using or disclosing CPNI. This is entirely consistent with customer expectations. Customers expect carriers to use CPNI to meet their needs, and generally do not draw distinctions between the corporate entities that provide them service. Moreover, as the Commission has repeatedly found, such sharing of information does not compromise consumer privacy interests.¹¹

B. CUSTOMER APPROVAL

4. If sections 222(c)(1) and 222(c)(2) require customer approval, but not an affirmative written request, before a carrier may use, disclose, or permit access to CPNI, must a BOC disclose CPNI to unaffiliated entities under the same standard for customer approval as is permitted in connection with its section 272 affiliate? If, for example, a BOC may disclose CPNI to its section 272 affiliate pursuant to a customer's oral approval or a customer's failure to request non-disclosure after receiving notice of an intent to disclose

¹⁰ Although the stringent structural separation and nondiscrimination obligations of sections 272 and 274 apply only to BOCs, Section 260 (*Provision of Telemessaging Service*) and Section 275 (*Alarm Monitoring Services*) impose explicit nondiscrimination duties that extend to all ILECs.

¹¹ See footnotes 6 and 7, *supra*.

(i.e., opt-out approval), is the BOC required to disclose CPNI to unaffiliated entities upon the customer's approval pursuant to the same method?

As shown in the Response to Question 1, if a BOC discloses CPNI to its 272 affiliate based on other than affirmative written consent (for example, oral consent or opt-out approval), the BOC must make the CPNI available to third parties based on the same approval method to comply with section 272(c)(1)'s nondiscrimination obligation. As the Commission held in the Non-Accounting Safeguards Order (¶ 16, 197), section 272(c)(1) imposes an unqualified prohibition against discrimination more stringent than the "unjust and unreasonable" discrimination prohibition of section 202(a), with the result that the "BOCs must treat all other entities in the same manner in which they treat their section 272 affiliates." Indeed, the Commission has already concluded that under section 272(c)(1) a BOC must provide to unaffiliated entities the same goods, services, and information that it provides its section 272 affiliate at the same rates, terms and conditions. Id. ¶ 202; see also id. ¶ 222.

5. If sections 222(c)(1) and 222(c)(2) require customer approval, but not an affirmative written request, before a carrier may use, disclose, or permit access to CPNI, must each carrier, including interexchange carriers and independent LECs, disclose CPNI to unaffiliated entities under the same standard for customer approval as is permitted in connection with their affiliates and other intra-company operating units?

Carriers, other than BOCs and ILECs, would not be required to disclose CPNI to unaffiliated entities except pursuant to affirmative written customer request. Absent an

affirmative written customer request (see section 222(c)(2)), section 222 does not itself impose upon carriers any affirmative obligation to disclose CPNI, and therefore the mere "approval" of a customer would not trigger a disclosure requirement for any carrier.¹² The duty of a BOC or other ILEC to disclose to others if it discloses to its affiliate arises from the nondiscrimination duties imposed on the BOCs and, in some instances, on all ILECs under various other sections of the 1996 Act.¹³ IXC's are not subject to the nondiscrimination requirement of section 272 (nor of sections 260, 274 or 275). Indeed, the Commission itself has previously concluded that it would not mandate that AT&T share its customers' CPNI with third parties, if it shared it with its wireless affiliate.¹⁴ Nothing in the 1996 Act supersedes this finding. See Response to Question 3.

¹² At the same time, as AT&T showed in its June 11, 1996 comments (at 17-19), section 222(c)(2) does not prohibit ILECs from disclosing CPNI to a CLEC that has won the customer and, in that circumstance, whatever approval is sufficient to authorize the change in local service provider must be deemed appropriate to authorize CPNI disclosure. See footnote 5, supra.

¹³ ILECs are subject to new statutory nondiscrimination requirements under sections 260 and 275 of the 1996 Act. In the Electronic Publishing Order (§ 216) the Commission determined that the nondiscrimination requirement of section 260(a)(2), like that of section 272(c)(1), is more stringent than the prohibition against unjust and unreasonable discrimination of section 202(a). See footnote 10, supra.

¹⁴ Applications of Craig O. McCaw and American Telephone and Telegraph Company for Consent to the Transfer of Control of McCaw Cellular Communications, Inc. and its Subsidiaries, 10 FCC Rcd. 11786, 11794 (§ 12) (1995).

6. Must a BOC that solicits customer approval, whether oral, written, or opt-out, on behalf of its section 272 affiliate also offer to solicit that approval on behalf of unaffiliated entities? That is, must the BOC offer an "approval solicitation service" to unaffiliated entities, when it provides such a service for its section 272 affiliate? If so, what specific steps, if any, must a BOC take to ensure that any solicitation it makes to obtain customer approval does not favor its section 272 affiliate over unaffiliated entities? If the customer approves disclosure to both the BOC's section 272 affiliate and unaffiliated entities, must a BOC provide the customer's CPNI to the unaffiliated entities on the same rates, terms, and conditions (including service intervals) as it provides the CPNI to its section 272 affiliate?

A BOC that solicits customer approval to use CPNI on behalf of, or to disclose CPNI to, its section 272 affiliate must offer an "approval solicitation service" to unaffiliated entities; otherwise it would be engaging in preferential conduct towards its affiliate. For such an approval solicitation service to be nondiscriminatory, the BOC would have to obtain approval for disclosure of CPNI to any entity providing a service -- whether local, long distance, electronic publishing or other information service -- that the BOC affiliate offers or would be authorized to offer.

The solicitation to obtain approval to disclose the CPNI to third parties must be made at the same time as for the section 272 affiliate. Because it would be impracticable to list as part of the approval solicitation each entity to which a customer's CPNI would potentially be disclosed, the BOC would have to obtain a blanket approval to disclose the CPNI to its section 272 affiliate and any requesting unaffiliated entity. The customer should not be permitted to authorize disclosure only to the BOC affiliate through such a

solicitation, as this would leave room for the BOC to game the process in favor of its section 272 affiliate. Once approval is obtained, the CPNI must be made available to any unaffiliated entity desiring to receive it at the same rates, and pursuant to the same terms and conditions, and at the same time, as the disclosure is made to the section 272 affiliate, as the Commission held in the Non-Accounting Safeguards Order, ¶ 202.

Alternatively, and without using any BOC information (e.g., subscriber lists) that would not also be available to other carriers, the section 272 affiliate could solicit its own approval, which (as explained in the Response to Question 1), would not trigger a duty for the BOC to disclose CPNI to third parties. Moreover, if the section 272 affiliate solicits customer approval, then the BOC would not have to offer an approval solicitation service to third parties.

C. OTHER ISSUES

7. If, under sections 222(c)(1), 222(c)(2), and 272(c)(1), a BOC must not discriminate between its section 272 affiliate and non-affiliates with regard to the use, disclosure, or the permission of access to CPNI, what is the meaning of section 272(g)(3), which exempts the activities described in sections 272(g)(1) and 272(g)(2) from the nondiscrimination obligations of section 272(c)(1)? What specific obligations with respect to the use, disclosure, and permission of access to CPNI do sections 222(c)(1) and 222(c)(2) impose on a BOC that is engaged in the activities described in sections 272(g)(1) and 272(g)(2)?

Section 272(g)(3) means that if a BOC sells or markets its section 272 affiliate's services, it need not sell or market the long distance services of unaffiliated carriers; that is, the BOC can endorse the services of its long distance

affiliate and can offer a local/long service package without including the long distance services of nonaffiliates. These activities were barred by the nondiscrimination obligations of the AT&T consent decree,¹⁵ and are explicitly exempted by section 272(g) from the nondiscrimination obligations of the Act.

At the same time, use and distribution, or solicitation of customer approval for use, of BOC CPNI is not marketing or selling under section 272(g). As explained in the introductory comments, there is nothing in sections 272(g)(1) and (g)(2) that authorizes the use of BOC CPNI for the marketing of the section 272 affiliate's services. Should the BOC or its section 272 affiliate wish to use BOC CPNI for joint marketing, then, as the Commission held in the Non-Accounting Safeguards Order (§ 222), the nondiscrimination requirement of section 272(c)(1) fully applies. Consistent with this holding, what the section 272(g)(3) exemption means is that joint marketing without the use of BOC CPNI does not violate the nondiscrimination requirement of section 272(c)(1). When BOC CPNI is used in joint marketing, the nondiscrimination obligations that pertain to its use are those explained in the Responses to Questions 1, 4, and 6.

8. To what extent is soliciting customer approval to use, disclose, or permit access to CPNI an activity described in section 272(g)? To the extent that a party claims that CPNI is essential for a BOC or section 272 affiliate to engage in any of the activities described in section 272(g), please

¹⁵ See, e.g., United States v. Western Electric Co., No. 82-0192, slip op. at 3 and n.4 (D.D.C. April 11, 1985).

describe in detail the basis for that position. To the extent that a party claims that CPNI is not essential for a BOC or section 272 affiliate to engage in those activities, please describe in detail the basis for that position.

Soliciting customer approval to use, disclose, or permit access to BOC CPNI is not an activity described in section 272(g) because marketing can proceed without the use of BOC CPNI. For example, a BOC affiliate could develop and offer to all consumers an integrated package of local and long distance services. More broadly, either a BOC or its section 272 affiliate could launch a television or magazine advertisement campaign that would offer local, long distance, internet access, without using BOC CPNI. Similarly, either the BOC or its section 272 affiliate could conduct a direct mail advertising campaign using subscriber lists that have not been segmented based on the subscriber's level of usage of the BOC's telecommunications services.¹⁶ Of course, either the BOC or its affiliate could conduct direct mail or telemarketing campaigns based on third party sources of demographic information about subscribers. Or, a BOC or section 272 affiliate could elect to send direct mail advertisements only to customers residing in certain zip codes or to telemarket to customers in certain telephone exchanges

¹⁶ Although customer, name and telephone number are not CPNI under section 222(f), if the section 272 affiliate uses a BOC subscriber list, to comply with section 272(c)(1), that list must be made available on a nondiscriminatory basis to other entities. The Commission expressly concluded that section 272(c)(1)'s nondiscrimination obligation extends to "information," which includes, but is not limited to, CPNI. Non-Accounting Safeguards Order, ¶ 222.

(NPA-NXXs), all without accessing BOC CPNI. The possibilities for joint marketing activities without using BOC CPNI are, quite literally, endless. Therefore, the Commission could not rationally construe section 272(g) as requiring the use of BOC CPNI as an essential ingredient in joint marketing.¹⁷ In those circumstances where BOC CPNI is used for the benefit of, or disclosed to, the section 272 affiliate in conjunction with joint marketing activities, the section 272(c)(1) nondiscrimination obligation thus fully applies.

9. Does the phrase "information concerning [a BOC's] provision of exchange access" in section 272(e)(2) include CPNI as defined in section 222(f)(1)? Does the phrase "services . . . concerning [a BOC's] provisions of exchange access" in section 272(e)(2) include CPNI-related approval solicitation services? If such information or services are included, what must a BOC do to comply with the requirement in section 272(e)(2) that a BOC "shall not provide any . . . services . . . or information concerning its provision of exchange access to [its affiliate] unless such . . . services . . . or information are made available to other providers of interLATA services in that market on the same terms and conditions"?

CPNI is encompassed by section 272(e)(2) because it includes usage-related information of access customers and end user customers who are the ultimate consumers of exchange access. Section 272(e)(2)'s use of the phrase "any . . . services" or "information concerning" (emphasis added)

¹⁷ The test for whether an activity constitutes joint marketing is whether it is "marketing or selling," not (as Question 8 implies) whether it is an essential ingredient to marketing or selling. See section 272(g). Otherwise, the section 272(g)(3) discrimination exemption for joint marketing activities could theoretically be construed to permit the BOCs to avoid affirmative service-related nondiscrimination and provisioning obligations because development of the services being sold could itself be viewed as "essential to" the act of marketing or selling.

supports broad construction of the nondiscrimination requirement. With respect to CPNI and CPNI approval solicitation services, the BOCs' obligations are identified in the Responses to Questions 1, 4 and 6 above.

10. Does a BOC's seeking of customer approval to use, disclose, or permit access to CPNI for or on behalf of its section 272 affiliate constitute a "transaction" under section 272(b)(5)? If so, what steps, if any, must a BOC and its section 272 affiliate take to comply with the requirements of section 272(b)(5) for purposes of CPNI?

A BOC's solicitation of customer approval to use, disclose, or permit access to CPNI for or on behalf of its section 272 affiliate constitutes a "transaction" under section 272(b)(5).¹⁸ As explained in the Response to Question 6, if the BOC solicits approval for its 272 affiliate, it must also solicit such approval on behalf of unaffiliated entities. To comply with section 272(b)(5)'s requirements, the BOC must post the transaction in the manner specified in the Accounting Safeguards Order, ¶ 122,¹⁹ so that any interested third party can request the CPNI for which the BOC has solicited and obtained disclosure approval from the customer. Until the solicitation transaction has been posted and a reasonable waiting period (for example, 10 days) has elapsed, the BOC may

¹⁸ The Commission has construed the term "transaction" under section 272(b)(5) to include assets and services transferred as well as shared in-house services. See Accounting Safeguards Under the Telecommunications Act of 1996, CC Docket No. 96-150, Report and Order, FCC 96-490, ¶¶ 122, 182, released December 24, 1996 ("Accounting Safeguards Order").

¹⁹ See also Electronic Publishing Order, ¶ 250 (FNPRM); Non-Accounting Safeguards Order, ¶ 182.

not disclose the CPNI to its affiliate because this would give the 272 affiliate a discriminatory advantage by permitting it to obtain the CPNI in advance of third parties.

11. Please comment on any other issues relating to the interplay between section 222 and 272.

12. Please propose any specific rules that the Commission should adopt to implement section 222 consistent with the provisions of section 272.

AT&T suggests the following rules to reflect the interplay between sections 222 and 272 of the 1996 Act:

(1) A BOC shall not use, disclose or permit access to CPNI of its customers, directly or indirectly, for the benefit of the affiliate required by section 272 of the Telecommunications Act of 1996, unless the CPNI is made available to all competing entities on nondiscriminatory terms. The foregoing shall not apply if the section 272 affiliate itself obtained the customer's affirmative written consent prior to use, disclosure or access to the customer's BOC CPNI.

(2) If a BOC wishes to solicit customer approval to use, disclose or permit access to CPNI to or for the benefit of its section 272 affiliate, the BOC must simultaneously seek such authorizations on behalf of its section 272 affiliate and all unaffiliated entities, without distinction, and on nondiscriminatory terms. A BOC may not use, disclose or permit access to CPNI for the benefit of its section 272

affiliate, until the transaction has been posted and a 10-day waiting period has elapsed.

II. INTERPLAY BETWEEN SECTION 222 AND SECTION 274

A. THRESHOLD ISSUES

13. To what extent, if any, does the term "basic telephone service information," as used in section 274(c)(2)(B) and defined in section 274(i)(3), include information that is classified as CPNI under section 222(f)(1)?

It would appear that the term "basic telephone service information" includes CPNI because it is defined in section 274(i)(3) as encompassing "customer information of a [BOC] and other information acquired by a [BOC] as a result of its engaging in the provision of basic telephone service." However, this does not obviate the BOCs' express nondiscrimination obligation with respect to electronic publishing teaming and business arrangements under section 274(c)(2)(B), nor the need to obtain approval for use of CPNI under section 222. Moreover, given the lack of definition of what constitutes a "teaming or business arrangement" (a term which the Commission expressly declined to clarify in the Electronic Publishing Order, ¶ 165), the enforcement of nondiscrimination and CPNI safeguards are critical in this context.

B. USING, DISCLOSING, AND PERMITTING ACCESS TO CPNI

(i). SECTION 274(c)(2)(A) - INBOUND TELEMARKETING OR REFERRAL SERVICES

14. Does section 274(c)(2)(A) mean that a BOC that is providing "inbound telemarketing or referral services related